Case No. 125062

IN THE
SUPREME COURT OF ILLINOIS

MARGARET DYNAK, Plaintiff-Appellant, v. BOARD OF EDUCATION OF WOOD DALE SCHOOL DISTRICT 7, Defendant-Appellee.	))))))))))	Appeal From the Appellate Court, Second District, Case No. 2-18-0551 There on Appeal From the Circuit Court of the 18th Judicial Circuit, DuPage County, Illinois Case No. 2016-MR-001368 Honorable Bonnie Wheaton, Judge Presiding

REPLY BRIEF
OF PLAINTIFF-APPELLANT MARGARET DYNAK

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POINTS AND AUTHORITIES

Argument

Argument

This case concerns whether a public school teacher has the right – under Section 24-6 of the Illinois School Code, 105 ILCS 5/24-6 – to use 30 days of accumulated paid sick leave over the course of 30 continuous work days following the birth of her child, where the birth occurred just before the summer recess. Despite the repeated, false contentions of Defendant-Appellee Board of Education of Wood Dale School District 7 ("the District"), this case does *not* raise the issue of whether Plaintiff-Appellant Margaret Dynak may use sick leave for birth "at any time and in any increment." (Dist. Br. 1).

Although the District does not dispute that courts may not read additional terms into a statute, it boldly asks the Court to do so, i.e., to read Section 24-6 to provide that sick leave for birth must be taken within 30 *calendar* days *immediately following* the birth. But the statute plainly does not provide that the use of accumulated paid sick leave is limited to the period of "30 days *from* birth," "*within* 30 days of birth," or "30 days *after* birth." Nor does it *require* that leave "for birth" begin immediately after the birth. The District's argument is therefore contrary to the plain, express language of the statute, which includes no such limitations, and instead contains terms that are clearly contrary to such a crimped reading. The District's argument also is contrary to the history of Section 24-6, including the Court's prior analysis of Section 24-6 and the Illinois School Code; relies on spurious assertions about the purported "legislative history" of Section 24-6; and refers to laws in other states that have no bearing on the meaning of Section 24-6.[1]

[1] Although a reply brief may not respond to an *amicus* brief, *In re G.O.*, 191 Ill. 2d 37, 45 (2000), Dynak does not acquiesce to any of the arguments made in the *amicus* brief filed in support of the District.

I. The District Asserts Facts Unsupported by the Record and Otherwise Mischaracterizes the Record

As a predicate for its arguments, the District makes unsupported factual assertions, including that, "on August 18, 2016, when the 2016-2017 school year began and more than two months after Dynak gave birth, *she was able to teach and attend work*. Accordingly, her request to use paid sick leave was denied." (Dist. Br. at 3) (emphasis added). The District also asserts that, "after an approximately 10-week summer break, Dynak was *no longer unable to work (or presumed to be unable to work)* due to the June 6, 2016 birth of her child." (Dist. Br. at 9) (emphasis added).

However, the record is devoid of any evidence with respect to Dynak's ability to teach or attend work on August 18, 2016 or thereafter. The record merely establishes that Dynak was on unpaid leave pursuant to the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 *et seq*., at the start of the 2016-17 school year. This fact does not lead to the conclusion that she was "able" to work and there is no evidence in the record with respect to that point. Moreover, there is no support in the record for any "presumption" about her ability to work or her fitness for duty at that time.

Furthermore, the District attempts to distort the timing of its denial of Dynak's request for leave, erroneously suggesting that it denied Dynak's request for leave at the beginning of the 2016-17 school year based on her "ability" to work. (Dist. Br. at 3). In fact, in April 2016, months before Dynak gave birth to her child in June, the District denied her request to use paid sick leave for birth at the start of the 2016-17 school year based on its erroneous interpretation of Dynak's rights under Section 24-6. (A.33, C.21; A.42, C.30).

Thus, the District's claims about Dynak's ability to work at the beginning of the 2016-17 school year are unsupported. Moreover, as explained below, because Section 24-

6 does not require that an employee be "unable" to work in order to use sick leave for birth (for 30 school days), the District's unsupported factual assertions are irrelevant.

II. The District Impermissibly Makes New Arguments

The District makes several arguments in its brief that it did not make in the trial court or in the appellate court, including that: the definition of "birth" is material to this case, (Dist. Br. at 5-6); under Section 24-6, sick leave may only be used when an employee is unable to attend work, (Dist. Br. at 3, 7, 9, 15); Dynak "was able to teach and attend work" at the beginning of the 2016-17 school year, (Dist. Br. at 3; see also *id.* at 9); and the placement of a 30-day limitation regarding adoptions in a separate sentence in Section 24-6 has substantive significance, (Dist. Br. at 10-11). In addition, these arguments cannot be said to respond to points raised by either Dynak or the appellate court.

Therefore, the District has forfeited these arguments by making them for the first time before this Court. *Wright Dev. Grp., LLC v. Walsh,* 238 Ill. 2d 620, 639-40 (2010); *City of Champaign v. Torres*, 214 Ill. 2d 234, 240, n. 1 (2005).

III. The District Attacks Interpretations of Section 24-6 That Are Not Offered by Dynak

Throughout the course of this litigation, the District has proceeded by ignoring the actual statutory language at issue and endlessly attributing to Dynak interpretations of Section 24-6 that have no relationship to the statutory interpretation she has *actually* advocated in this case. To this point, in its brief (and throughout the course of litigation) the District repeatedly mischaracterizes Dynak's statutory interpretation, asserting that Dynak argues that: Section 24-6 "vests her with the ability to use 30 paid sick days" at *any* time in the future, (Dist. Br. 1, 11, 15); Section 24-6 provides for "paid parental leave,"[2]

[2] The District offers no explanation of the term "paid parental leave," how

(Dist. Br. at 2, 7, 12, 20); sick leave for birth does not need to be connected, in any way, to the event of birth, (Dist. Br. at 2, 5, 14, 16-17); and sick leave for birth may be used "at any time and in any increment," (Dist. Br. at 1, 17, n. 4, 18).

However, Dynak does not make – and has not made – *any* such sweeping claims at *any* point in the course of this litigation. Indeed, it would be illogical for Dynak to advocate for any such positions, as the facts of this case and her requested leave present a much narrower question: Whether she has the right to use 30 days of accumulated paid sick leave on 30 *continuous work* days, commencing *immediately* after the birth of her child.[3]

The District's strawman versions of Dynak's interpretation conveniently overlook Dynak's explicit acknowledgment that, under her interpretation of Section 24-6, the right to use sick leave for birth is limited based on the statutory language itself. Under her interpretation, the leave must be "for birth," and is limited to 30 days of absence *from work* (without needing to provide medical certification). Thus, contrary to the District's assertions, Dynak has argued that Section 24-6 *requires* that there be a connection between the use of accumulated paid sick leave and the birth of a child – and, in this case, there was such a connection. The District conveniently ignores the actual, narrow question presented in this case, finding it easier to attack contentions that Dynak simply has not made.

Moreover, Dynak's reading of the plain language of Section 24-6 avoids impermissibly reading in additional limitations, while ensuring that use of leave is subject to reasonable temporal restrictions. The limitation is derived from the statutory requirement

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that term is supposed to be defined, or how any notion of "parental leave" is relevant to interpreting Section 24-6. *See also* Dynak Br. at 47, n. 24.

[3] As noted in her opening brief, Dynak does not take the position that leave "for birth" must *necessarily* begin on the work day immediately after birth, as the question of the delayed use of leave for birth is not raised by the instant appeal. (*See* Dynak Br. at 7, n. 3).

that the leave be "for birth" within the meaning of Section 24-6. If a birth occurs at a time where a break during the school year (summer, winter or spring) interrupts the continuous use of the 30 work days of accumulated sick leave, there is no basis on which to conclude that the interruption would cause the continued use of sick leave for the recent birth to no longer be "*for birth*" – and there is no language in Section 24-6 to support such a conclusion. Therefore, under such circumstances, the employee is still entitled to use a total of 30 days of paid sick leave without medical certification.

The District's strategy in responding to Dynak's statutory analysis lays bare the defect of its position: Since the District cannot present any textual analysis to contradict Dynak's interpretation of the plain language of Section 24-6, the District takes refuge in repeatedly knocking down interpretations and arguments that have not been made.

IV. The District's "Legislative History" Analysis is Hopelessly Flawed

The District offers several arguments that allegedly relate to the "legislative history" of Section 24-6, none of which supports its conclusion that the use of sick leave for birth is limited to the 30 calendar days after birth. Moreover, in so arguing, the District concedes that, when Section 24-6 was amended in 2007, the legislature "added additional reasons that allow school employees to use paid sick leave," and that "birth" was '"distinct' and separate from 'personal illness, quarantine at home, serious illness or death in the immediate family or household.'" (Dist. Br. at 19).

A. The District's Arguments Regarding the Treatment of Adoption Under Section 24-6 Are Misplaced

The District argues that the 2009 amendment to Section 24-6 – limiting the use of sick leave for birth (without certification) and for adoption or placement for adoption to 30 school days – created a 30-calendar-day limitation on the use of sick leave for birth *from*

the date of birth. (Dist. Br. at 19). That argument is simply wrong. Between 2007 and 2009, there was *no restriction* on how much accumulated sick leave could be used for birth or adoption, as Section 24-6 merely provided that sick leave could be used for birth (or adoption), absent any explicit limitations. The 2009 amendment imposed a 30-school-day limit on leaves for birth (without certification) and on adoption, but it did not specify when those leaves must be taken or must begin.

The District also asserts that the "Legislature specifically connected 'birth' with 'personal illness'" and did not "write separate language for 'birth,' as it did for 'adoption or placement for adoption.'" (Dist. Br. at 20). As explained above, the District raises this argument for the first time on appeal and therefore it has been waived. Moreover, even if the argument were not waived, it is without support.

As amended in 2007 and 2009, Section 24-6 separately addresses the timing of the use of sick leave for birth, and for adoption or placement for adoption. As the appellate court majority observed, the adoption process does "not necessarily begin clearly on a specific date," and "the adopting employee might need to be present for a period of time before receiving custody of the child." *Dynak v. Bd. of Educ. of Wood Dale Sch. Dist. 7*, 2019 IL App (2d) 180551, ¶ 37. No such issue arises with respect to leave "for birth," as there can be no dispute about *when* a birth occurs. Therefore, the statute did not need to define or address the issue of when a "birth" takes place.

While the statute does provide that school districts "may" require proof that the formal adoption process is underway in order to use sick leave for adoption or placement for adoption, that does not support the District's claim that leave for birth may *only* be used over a 30-day calendar period beginning with the birth. As is the case with birth, Section

24-6 does *not* provide that the use of paid sick leave for adoption *must* be used consecutively once the adoption process is underway. In fact, there is no reason that, once the formal process is underway, an employee could not use some sick days for adoption for a period of time before taking custody of the child, and then use the remaining days (up to 30 school days) after taking custody of the child. Again, the appellate court majority correctly ruled that adoption-related sick leave "necessarily" incorporates the period of time *prior* to taking custody of the child. *Dynak*, 2019 IL App (2d) 180551, ¶ 37.

For the same reason, the District is wrong in asserting that Dynak's interpretation would result in the "use of paid sick leave for a longer period of time following the arrival of child to the home for employees giving birth" than it would for adoption. (Dist. Br. at 11). For each use, there is a right to use sick leave for 30 school days, and with respect to birth that period is without medical certification. And, Section 24-6 does not limit the use of leave for adoption to the 30 calendar days immediately following the date on which the adoption is first "underway." Rather, the statute only provides that school districts may require that an employee "provide evidence that the formal adoption process is underway," and that "such leave is limited to 30 days." But the statute does not say that the 30-day period begins to run *as soon as* the adoption is first underway. As with adoption (where the adoption must be underway), there is a right to use sick leave for "birth" after the birth.

Moreover, the District *again* would require reading in additional limiting language (reading 30 days to be 30 calendar days with respect to adoption). Further, the District's interpretation would create a glaring paradox: If, as the District argues, the 30-day calendar period to use sick leave for birth is based on the "typical" post-partum period of recovery, there is no rational explanation for why such a limitation would apply in cases of adoption

(or to fathers).[4] On the other hand, if the District were to claim that the period for leave for adoption is not measured by 30 calendar days, but instead by some other period of time, then the District's interpretation would result in reading the phrase "30 days" differently within the same statute – a facially untenable proposition.

Significantly, the District's focus on the 2009 amendment to Section 24-6 also ignores the importance of the 2007 amendment. When the language ", or birth, adoption, and placement for adoption" was added to Section 24-6 in 2007, it was separated from the other existing enumerated bases for using sick leave by a comma and the word "or." The appellate court majority agreed, that, by doing so, the General Assembly did not intend to limit the use of sick leave for "birth" based on any purported medical need. *Dynak*, 2019 IL App (2d) 180551, ¶ 20.

In response, the District claims to "eviscerate" this argument by pointing out that the right to use 30 days of sick leave for birth absent medical certification is placed in the same sentence as the right to use 3 days for personal illness absent medical certification, and that the statute provides the right to use 30 days of leave for adoption or placement in a separate sentence. (Dist. Br. at 10). However, the District's argument ignores almost all of Dynak's statutory analysis, and mistakenly attributes significance to the placement of the reference to the 30-day limitation for adoption in a separate sentence.

Dynak's "grouping" argument is based on the specification of the bases for which sick leave may be used under Section 24-6, and the General Assembly's creation of *two* categories of leave: (1) for personal illness, quarantine at home, serious illness or death in

[4] The District attempts to remedy this problem by asserting, absent any support, that the General Assembly intended the period for adoption to be the same as the period for birth, despite the fact the District also argues that Section 24-6 treats leaves for birth and adoption differently. (Dist. Br. at 10-12).

the immediate family or household," and (2) for "birth, adoption, or placement for adoption." (Dynak Br. at 20-29). Dynak's analysis is therefore based on the statute's definition of when sick leave may be used. That interpretation does not depend on the statute's subsequent references to the use of 30 days of sick leave for birth and for adoption or placement for adoption, and therefore is not undercut by those subsequent references. Moreover, the appellate majority correctly concluded that the distinction between the two categories of personal illness and birth was "reinforced by" "the benefits associated with each" and the different duration of the periods for medical certification. *Dynak*, 2019 IL App (2d) 180551, ¶ 22.

In addition, the District's argument is focused on the wrong time period. Section 24-6 provides school districts with the authority to require medical certification "as a basis for pay during leave *after* an absence of … 30 days for birth." 105 ILCS 5/24-6 (emphasis added). That is, the District's authority to require medical certification is only relevant to leaves for birth *beyond* 30 days. The issue at hand concerns what time period Dynak may use the 30 days of sick leave for birth *before* the District may require medical certification.

Finally, once an employee has used 30 days of sick leave for birth without medical certification, the employee has the right under Section 24-6 to use additional accumulated sick leave if the employee is suffering from a personal illness or if there is serious illness in the immediate family or household (such as with respect to the baby). But this says nothing about when the right to use the *initial* 30 days of sick leave for birth commences.

B. The District's Reliance on a Statement by a Legislator Does Not Support its Interpretation of Section 24-6

The District quotes from a statement made in 2009 by Senator Susan Garrett, on the bill that added the "30 days for birth" language to Section 24-6. (Dist. Br. 20). The

quoted statement does not advance the District's argument, for several reasons.

First, "birth" was added as a basis for sick leave in 2007, not in 2009. As addressed above, in 2009, Section 24-6 was again amended to prohibit school districts from being able to require medical certification as a basis for pay during leaves of "30 days for birth." In any event, neither the 2007 nor the 2009 amendments to Section 24-6 said anything that would support the District's contention that leave for birth is limited to the 30 calendar days immediately after birth.

Second, Senator Garrett's statement provides no insight into the meaning of Section 24-6, because her statement simply repeated the statutory language that was added in 2009. She said that "[t]hose leaves [i.e., for birth or adoption] are limited to thirty days unless a bargaining unit has negotiated a longer period," after which school districts may "require a certificate from a physician or other medical professional as a base - - basis for paid leave." Ill. S. 96th General Assembly, 30th Legislative Day, p. 15 (2009). In the present case, there is no dispute that Section 24-6 provides that employees are entitled to use up to 30 days of accumulated sick leave for birth without medical certification, the very proposition Senator Garrett articulated. The dispute in this case is whether an employee loses the right to take such leave where the use of 30 days of sick leave is interrupted by an intervening period of nonwork days (i.e., summer, winter, or spring break).

Third, a statement by a single legislator does not establish legislative intent. *Craddock v. Annawan Cmty. Unit Sch. Dist. No. 226*, 76 Ill. App. 3d 43, 52 (3d Dist. 1979), *aff'd*, 81 Ill. 2d 28 (1980); *Town of City of Bloomington v. Bloomington Twp.*, 233 10 Ill. App. 3d 724, 736 (4th Dist. 1992).

The District also seeks to draw an inference from the fact that "[n]o questions or

discussion followed Garrett's statements." (Dist. Br. 20). But there is no inference to be drawn from that either, since she was just echoing the statutory language. Likewise, the District claims that, if the legislature had intended to create a paid parental leave benefits, Senator Garrett or someone else "would have said something to that effect." (Dist. Br. at 20). Here, again, the premise of the District's assertion is false, since Dynak does not contend that Section 24-6 provides for "parental leave." And, the fact that no legislator discussed whether or not there was a requirement that leave for birth is limited to the days immediately after the birth does not support the District's claimed interpretation.

C. The Recent Parental Leave Regulation Applicable to Certain State Employees Says Nothing About the Legislative History of Section 24-6

As part of its "legislative history" argument, the District claims that "the Illinois Legislature" has provided "for paid parental leave," for certain state employees. (Dist. Br. at 21 (citing 80 Ill. Admin. Code § 303.130))). This contention has no bearing on this case. First, the regulation quoted by the District was just that: an *administrative regulation*, and was not an expression of anything that the *legislature* has done. Second, the cited rule was adopted on July 26, 2019 so that the regulations of Department of Central Management Services ("CMS") would "mirror" the terms of a recently-executed collective bargaining agreement between CMS and a public sector labor union. 43 Ill. Reg. 8590 (2019). *See* 80 Ill. Adm. Code § 303.130. Fundamentally, this administrative regulation is wholly irrelevant to the legislative history of Section 24-6, as well as the statute's meaning.

D. The Paid Family Leave Laws in Other States Are Immaterial

In another portion of the District's discourse on the "legislative history" of Section 24-6, the District refers to paid family leave laws in certain other states, and argues that Dynak contends "that the Illinois Legislature has provided an even more generous (*i.e.* full

pay) paid family leave benefit, but *only* to full-time teachers and other school staff members… rather than all employees in the state." (Dist. Br. 23) (emphasis added).

First, the District's argument here is premised on its assertion that Dynak has argued that Section 24-6 provides a "paid parental or family leave benefit" for certain public school employees. However, as previously articulated, Dynak has never claimed the right to use sick leave for birth under Section 24-6 qualifies as "paid parental leave." Moreover, the District repeatedly uses this phrase without explaining it or ascribing it a clear definition, and it otherwise lacks a clear meaning. As Dynak's *interpretation* of Section 24-6 is wholly unrelated to any notion of paid parental leave, the District's arguments based on other states' *parental leave* laws are irrelevant.

Second, the District argues that the Court should reject Dynak's statutory interpretation, because it leads to the conclusion that the General Assembly provides a "generous" birth leave benefit to certain public school employees, but which is not available to all employees in the state. (Dist. Br. 23). However, the District's *own* reference to the CMS regulation cited just a page earlier in its brief completely undercuts its point. The very regulation cited by the District explicitly provides a right to paid parental leave *only* to the certain subset of public employees covered by CMS' regulation – thereby covering only *some* state employees, let alone all public employees in the state.

Moreover, it is irrefutable that the legislature does in fact provide teachers and other public school employees with a number benefits not available to other public (or private) employees. To this point, the Illinois School Code explicitly affords rights to public school district employees, and teachers in particular, that are not provided by statute (or otherwise) to all other government employees in Illinois, or employees of private employers located

in Illinois, including: paid sick leave for, among other things, personal illness or serious illness or death in the immediate family or household, (105 ILCS 5/24-6); protections for tenured teachers against dismissal without cause, (105 ILCS 5/10-22.4, 105 ILCS 5/24-12(d)(7)-(8)); the right to take paid sabbatical leaves for teachers, principals, and superintendents, (105 ILCS 5/24-6.1); duty-free lunch periods for teachers, (105 ILCS 5/24-9); and a defined-benefit pension for teachers, (40 ILCS 5/16-133(b)).

Finally, what other states provide is wholly immaterial to the rights the Illinois legislature chooses to afford to public school employees. *See People v. Barham*, 337 Ill. App.3d 1121, 1129 (5th Dist. 2003) (in order to take notice of statutes in other states, "the statute must be *material* to a determination of the issues in the case") (emphasis added)). The statutes passed by other states cited by the District simply have *no bearing* on the meaning of Section 24-6.

E. The District Fails in its Effort to Rebut the Significance of the Child Bereavement Leave Act

Dynak cited the Child Bereavement Leave Act – which provides leave for employees in connection with the death of an employee's child, and has an explicit limit that such leave "must be completed within 60 days after the date on which the employee receives notice of the death of the child," 820 ILCS 154/10(b) – as an example of how the General Assembly knows how to place temporal limitations on leaves when it intends to do so. (Dynak Br. at 32-34).

In response (under the general heading of the "legislative history" of Section 24-6), the District first states that "the Illinois Legislature did not prescribe a specific period of time within which sick leave, pursuant to Section 24-6, may be taken for any of the qualifying events, including personal illness." (Dist. Br. at 25). But that is the very point:

The legislature enacted a limitation in the Bereavement Act when it intended to, and it did not in Section 24-6.

Second, the District asserts that, "to accept Dynak's argument in the context of birth, this court would also have to accept it in the context of all of the other Section 24-6 qualifying events," including those involving illness. (Dist. Br. at 25). However, that assertion is wholly non-responsive to the significance of the Bereavement Act. On its face, Section 24-6 *does* place a limitation for the use of sick leave for illnesses (3 days of absence without a doctor's certification) and 30 school days for birth.

Third, The District observes that, unlike Section 24-6, the Bereavement Act "also places clear restrictions on the use of such unpaid bereavement leave" (in the form of a notice requirement), and the "Legislature surely would have included similar reasonable restrictions in Section 24-6 had it intended to provide the type of paid leave benefit now claimed by Dynak." (Dist. Br. 26). But the District's argument is backwards, and does not support its conclusion. The Child Bereavement Leave Act, unlike Section 24-6, *does* specify when the leave must be taken. Therefore, a notice provision in that statute, and the absence of one in Section 24-6, says nothing about whether there is a proximity restriction in Section 24-6. Indeed, the absence of a notice provision supports the conclusion that there is no explicit proximity restriction in Section 24-6.

V. The Definition of "Birth" is Immaterial

In attempt to support its claim that leave for birth must be limited to the six to eight week period immediately following birth, the District quotes certain definitions of "birth." (Dist. Br. at 5-6). As mentioned above, the District raises this argument for the first time on appeal and therefore it has been waived. Moreover, even if this argument had not been

waived, it is a non sequitur. There is no question that Dynak gave *birth* to a child, and that she did so on June 6, 2016. Put another way, the definition of the term "birth" has no bearing on the question of whether intervening periods of nonwork days affect her right to use 30 days of paid sick leave for such an event – particularly where there is *no dispute* that Dynak gave birth to a child. The "birth" is merely the event that gives rise to her right to use sick leave, and this case is solely concerned with what happens *after* the birth and Dynak's right to use 30 days of sick leave once a child has been born.[5]

VI. The District's Arguments Regarding the *Winks* Case Are Erroneous

In her opening brief, Dynak cited *Winks*, 78 Ill. 2d 128, to explain the history of Section 24-6. In that case, the Court held that, prior to being amended in 2007, Section 24-6 did *not* provide for the use of sick leave for birth, and specifically did not provide for the use of sick leave for "normal" pregnancies or childbirths, as neither qualified as a "personal illness" under Section 24-6. *Id*. at 140. Against this background, when Section 24-6 was amended in 2007 to add "birth" and "adoption" as bases for using sick leave, the General Assembly did not include any requirement that a teacher must suffer from "temporary incapacity" or "physical incapacity" related to birth in order to use sick leave *for birth*. (Dynak Br. 21-23).

In response, the District argues that *Winks* does not support Dynak because "*Winks* dealt with a previous version of Section 24-6 that did not include any of the relevant

[5] The District also asserts that Section 24-6 should be read to align with the postpartum period. (Dist. Br. at 8, 13). But the District's contention has no basis in the statutory language itself, and indeed is contradicted by the very language of Section 24-6, the history of the statute, as well as the Court's decision in *Winks v. Bd of Educ., Normal Cmty. Unit Sch. Dist. No. 5*, 78 Ill. 2d 128 (1979) (discussed below) and the amendment of Section 24-6 thereafter, all of which make clear that sick leave for birth (for 30 work days) is not predicated on a medical or illness-based need.

language at issue here." (Dist. Br. at 26-27). But that misses the point. *Winks* is relevant to the issue presented here *because it was decided before Section 24-6 was amended* in 2007 and 2009; that is, before Section 24-6 explicitly provided for the right to use sick leave for "birth." Moreover, because the Court's decision in *Winks* addressed the pre-amendment use of sick leave for the period following "normal" childbirth (including the School Code's use of the terms "temporary incapacity" and "temporary disability" to refer to that period), that decision and the subsequent amendment of Section 24-6 squarely reject the District's argument that, when the right to use sick leave for "birth" was added to Section 24-6, it only provided leave in order to recover from the physical act of giving birth.

The District also argues that *Winks* is distinguishable because the plaintiff there sought to use sick leave shortly after her delivery. (Dist. Br. at 27). But that is a distinction without a difference. *Winks* is significant because it provides insight into the meaning of the amendments to Section 24-6 in 2007 and 2009 and the purpose of leave "for birth."

In addition, the District's logic once again is backwards: Dynak need not offer "specific evidence that the Legislature ever considered the *Winks* ruling when it first amended Section 24-6 nearly 30 years later" (Dist. Br. at 27); instead, "[t]he legislature is *presumed* to be aware of judicial decisions interpreting legislation." *Pielet v. Pielet*, 2012 IL 112064, ¶ 48 (emphasis added). Therefore, it is *the District's* burden to present "specific evidence" that the legislature was *not* responding to and considering *Winks*, a burden that the District has failed to meet.

VII. The District Erroneously Contends That Sick Leave for Birth is Only Available When an Employee Cannot Work

The District asserts that "[s]ick leave must be used at a time when an employee is unable to attend work because of the birth." (Dist. Br. at 7; *see also id.* at 3, 9, 15). But that

contention fails – aside from having been forfeited since it was not raised below – because it has no basis in the statutory language or history, and is simply made of whole cloth. It also fails because it flies in the face of this Court's repeated admonitions that courts may not read language into a statute. *Gaffney v. Orland Fire Prot. Dist.*, 2012 IL 110012, ¶ 56; *see also* Dynak Br. at 35 (citing additional cases).

The District contends that a case cited by Dynak, *In re Marriage of Abrell*, 236 Ill. 2d 249 (2010), supports the District's point that "[s]ick days and vacation days are alternative wages meant to be paid when the wage earner is unable to work or decides to take a vacation." (Dist. Br. at 9). However, Dynak cited that case for the proposition that sick leave must coincide with days when school is in session, i.e., on a work day. The Court in *Abrell* did not consider whether sick leave *for birth* – under Section 24-6 or otherwise – is limited to days on which an employee is unable to work. Indeed, under Section 24-6, as explained above, there is a dichotomy between the illness-based uses of sick leave, and those that are not based on illness, as the appellate court correctly recognized in the present case.

Moreover, this Court's decision in *Winks*, and the amendment of Section 24-6 thereafter, refute the District's contention that sick leave for birth is illness-based.

VIII. The District's Arguments About the FMLA do Not Support its Statutory Interpretation

The District makes two arguments with respect to the FMLA, neither of which supports its statutory interpretation.

A. The Fact That the FMLA's Regulations Provide Leave for Bonding Does Not Lead to the Conclusion That Leave For Birth Under Section 24-6 is Intended to Cover a Period of Illness or Incapacity

The District asserts that the FMLA "explicitly states '[e]ligible employees are

entitled to FMLA leave for pregnancy or birth of a child as follows: (1) [b]oth parents are entitled to FMLA leave for the birth of their child. (2) [b]oth parents are entitled to FMLA leave to be with the healthy newborn child (*i.e., bonding time*) during the 12-month period beginning on the date of birth…" 29 C.F.R. § 825.120(a)(1-2) (emphasis added)." (Dist. Br. at 15).[6] However, the District conflates the statutory text of the FMLA with regulations issued by the U.S. Department of Labor ("DOL"). The FMLA itself actually "explicitly" provides that a covered employee may take FMLA leave "[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter." 29 U.S.C. § 2612(a)(1)(A).

Moreover, the fact that the FMLA provides for the right to take leave to care for newborn children in addition to birth does not undercut the fact that the right to use sick leave for birth under Section 24-6 of the School Code does not depend – during the first 30 school days of leave – on the illness or incapacity of the parent, or of the child. As explained above, based on the text and history of Section 24-6, use of sick leave for birth (and for adoption or placement for adoption) is a separate category from illness-based leaves.

B. There is No Evidence to Support That Dynak was Granted FMLA Leave Only for the Purpose of Bonding With Her Newborn Child

In her opening brief Dynak stated that, by granting her 12 weeks of unpaid FMLA leave at the beginning of the 2016-2017 school year, the District "admitted that the use of unpaid FMLA leave at the beginning of the 2016-17 school year was *for birth*, but then

[6] The District also asserts that, because the FMLA's regulations provide a 12-month period from birth to use such leave for "birth," this establishes that the FMLA treats birth as a "discrete event." (Dist. Br. at 24). However, the District offers no explanation for how a one-year limitation on the use of FMLA leave for birth supports the conclusion that "birth" is a "discrete" event under that Act, and instead – like much of its argument – merely asserts the point.

denied, absent explanation, that the use of paid sick leave *over that very same time period* was 'for birth,' as required by the School Code." (Dynak Br. at 31) (emphasis original). In response, the District asserts that it was required to grant unpaid FMLA leave for "bonding" purposes within the first twelve months following the birth of a child (Dist. Br. at 24).

However, there is no evidence in the record to support the District's assertion. Neither Dynak's request for leave, (A.40, C 28), nor the District's response, (A.42, C 30), said anything about bonding. Thus, the District's decision to deny use of sick leave under Section 24-6, but to grant the use of unpaid FMLA leave, only referred to the expected *birth* of Dynak's child.

IX. The District Has Failed to Rebut Dynak's Right to Recover Attorneys' Fees Under the Wage Act

The District argues that Dynak is not entitled to attorneys' fees under Count II of her complaint pursuant to the Attorneys Fees in Wage Actions Act, 705 ILCS 225/1, because she "did not work on the 28.5 days in question and, therefore, did not *earn* any wages." (Dist. Br. at 29) (emphasis original). But that reading of the Wage Act would render it a nullity, because any time an employer failed to pay wages, it could escape liability for attorneys' fees by asserting that the employee had not "earned" wages. The only reason Dynak was not paid was *because* the District violated Section 24-6 by refusing to allow her to use her accumulated paid sick leave for the birth of her child.

The District also asserts that Dynak was not harmed, because she could "use those 28.5 sick leave days at some future date" or they could be credited toward retirement benefits. (Dist. Br. at 29). But Dynak was harmed by the denial, as explained in her opening brief, (Dynak Br. at 44-46), an explanation that the District has ignored, much less refuted.

The District also asserts that the Wage Act does not apply to claims for backpay in

wrongful discharge cases, because there is no claim for wages actually worked. (Dist. Br. at 29). But that principle does not preclude the claim here, because, before Dynak requested leave for birth, she had already earned – *accumulated* – paid sick leave days, based on *work performed in prior school years*. The right to use sick leave is therefore no different in this respect from the right to be paid for work already performed. *See In re Marriage of Abrell*, 236 Ill. 2d 249, 264 (2010) ("[s]ick days and vacation days are alternative wages"); *see also Kulins v. Malco, A Microdot Co.*, 121 Ill. App. 3d 520, 525-26 (1st Dist. 1984) (employees' right to accrued severance benefits, a form of deferred compensation, vested when the work was performed); *Bahr v. Bartlett Fire Prot. Dist.*, 383 Ill. App. 3d 68, 79 (1st Dist. 2008) (success in obtaining disability benefits entitled plaintiff to attorneys' fees under the Wage Act); *Affetto v. TRW, Inc.*, 691 F.2d 357, 362 (7th Cir. 1982) (retirement annuities and insurance benefits are wages under Wage Act, and attorneys' fees should be allowed against employer).

Conclusion

For the foregoing reasons, and for the reasons set forth in Dynak's opening brief, the Court should reverse the judgment of the appellate court, and should remand with directions to grant Dynak's motion for summary judgment with respect to Counts I and II of the complaint, to award her damages in the amount of $7,991.69 as the value of the 28.5 days of sick leave pay that the District denied her, and to award attorneys' fees (in an amount to be determined by the trial court) pursuant to Count II and the Wage Act.

Respectfully submitted,

/s/ Ryan M. Thoma
One of the Attorneys for Plaintiff-Appellant
Margaret Dynak

Certification of Compliance

I hereby certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) Statement of Points and Authorities, the Rule 341(c) Certificate of Compliance, and the Certificate of Service, is 20 pages.

/s/ Ryan M. Thoma

Certificate of Service

I, Ryan M. Thoma, an attorney, certify that I filed the foregoing Reply Brief of Plaintiff-Appellant Margaret Dynak with the Illinois Supreme Court Clerk's Office, by using the Odyssey eFileIL electronic filing system, on the 30th day of December, 2019.

I further certify that I served the foregoing Reply Brief of Plaintiff-Appellant Margaret Dynak on the following persons by email on the 30th day of December, 2019:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned attorney certifies that the statements set forth in this instrument are true and correct.

/s/ Ryan M. Thoma